IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Nos. 00-5212, 5213

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MICROSOFT CORPORATION,
Defendant-Appellant,

v.

UNITED STATES OF AMERICA and STATE OF NEW YORK, *et al*.,
Plaintiffs-Appellees

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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MOTION OF LAURA BENNETT PETERSON
FOR LEAVE TO FILE AN AMICUS BRIEF

The Movant, Laura Bennett Peterson, an antitrust scholar, attorney, and economist, respectfully requests leave to file a brief in the above case as an amicus curiae. An analytical framework that combines law and economics would, she suggests, contribute to the resolution of this case. As this Court's opinion in United States v. Microsoft Corp., 147 F.3d 935 (D.C. Cir.1998), shows, the parties cannot be relied on adequately to supply this framework.

While the United States and the States have consented to my filing of an amicus brief, Microsoft Corporation ("Microsoft") has not. This Motion is thus necessary under Rule 29(a) of the Federal Rules of Appellate Procedure.

GROUNDS FOR MOTION

I. Movant's Interest

My interest in this case is based on my work as an antitrust scholar, attorney, and economist. I have closely followed the proceedings in this and the related consent decree case, cited supra. I have at no time, however, represented or served as a consultant to any of the parties, nor do I have, or have I ever had, any interest, other than that of a scholar, in this case.

My relevant background -- many years of study, practice, teaching, and writing in law (particularly antitrust) and economics -- is summarized in the accompanying Affidavit.

II. Justification for an Amicus Brief

Microsoft challenges numerous findings of fact. Appellant Microsoft Corporation's Motion for an Order Governing Further Proceedings (Oct. 2, 2000) at 3 (hereinafter "Scheduling Motion"); Jurisdictional Statement filed with the Supreme Court in Microsoft Corp. v. United States (No. 00-139) (July 26, 2000), Part I. Microsoft also identifies nineteen "principal legal issues." *See* Appellant's Scheduling Motion, supra, Appendix A; Jurisdictional Statement, supra, Part II.

These papers offer no thread of Ariadne through the labyrinth of factual and legal issues on appeal. An analytical framework that combines law and economics could help to provide such a thread. It could thereby help to resolve the numerous, complicated, and interrelated issues on appeal. Such a framework could guide the Court in working through and evaluating the extensive record on appeal, and in weighing the procedural and substantive implications of the facts found (or absent) therein.

The parties' arguments in the related consent decree case, United States v. Microsoft Corp., supra, 147 F.3d 935, offer little hope that they themselves will provide such a framework. "**The parties offer us little help** in picking the correct analogy." Id. at 946 (emphasis added) (referring to the relation between Windows 95 and Internet Explorer). The Department of Justice's concept of "browser functionality" has "a fatal flaw. The interpretation that Microsoft advances most strongly suffers **mirror-image defects:** it **lacks much logical sense** and it fails to fit the decree's setting . . . ." Id. at 947 (emphasis added).

This Court went on to observe:

> Curiously, **in both parties' readings** Microsoft's behavior determines the permissibility of conditioned licensing. This would be **no defect if the behavior were in some way relevant to the economic principles of tie-ins. But it is not**. . . . **[B]oth readings allow legitimation by behavior that is either irrelevant or actively harmful**.

Id. at 948 (emphasis added). It devolved upon the Court, with little help from the parties, to construe the consent decree in a manner consistent with both the parties' intent in entering into the decree and the procompetitive purposes of the antitrust laws. *See* id. at 946-48. *See generally* Robert H. Bork, The Antitrust

Paradox: A Policy at War with Itself 412 (1978) (noting that "our courts have had too little assistance . . . from the practicing bar").

III. Relevance of My Amicus Brief

Movant would, in an amicus brief, apply her education and experience in law and economics, outlined in the accompanying Affidavit, in an effort to assist the Court in resolving this case. The Court should not have to work as hard as it did in the consent decree case to weed out reasoning that may, if past is prologue, misapprehend the facts and misconstrue the law.

The impact of the Court's decision on the development of antitrust law and public policy, and on the structure, conduct, performance, and evolution of the high-technology sector and the economy as a whole, will be profound. This makes it all the more important for the Court to apply sound economics as well as sound law. It also makes it all the more important for the Court to be able to draw upon a perspective that is broader and more impartial than that of the parties.

The classic role of an amicus is to supplement the efforts of counsel with a view to assisting the court in a case of general public interest. Miller-Wohl Co. v. Commissioner of Labor and Indus., 694 F.2d 203, 204 (9th Cir. 1982), cited in Plaintiffs' Response to Microsoft's Objection to Participation by Professor Lawrence Lessig as an Amicus Curiae at 2, in United States v. Microsoft, Nos. 98-1232, 1233 (D.D.C. filed Dec. 20, 1999). It is this role I seek to fill through the filing of an amicus brief.

RELIEF SOUGHT

The Movant, Laura Bennett Peterson, respectfully asks the Court to grant her Motion for Leave to File an Amicus Brief.

Respectfully submitted,

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October 25, 2000